subsidiary company, even a 100 percent subsidiary company, are distinct legal entitles ..."

Since the plaintiff Company is a separate legal entity, its board of directors is one of its organs and all members of the board are the agents of the plaintiff company. In *Northern Counties Securities Ltd.* v. *Jackson & Steeple Ltd.*[2] Walton J. clearly said:

". . . a director is an agent, who casts his vote to decide in what manner his principal shall act through the collective agency of the board of directors."

In the instant case, when the members of the board met and passed resolution, they were therefore, acting on behalf of their principal, *viz*, the plaintiff company. Thus, the second, third, fourth and fifth defendants were acting solely as agents of the plaintiff company when they set at the said board meeting and passed the resolution in question. The said resolution cannot constitute a contract as a contract can be only concluded between at least two parties. Section 10(1) of the Contracts Act, 1950 clearly states:

"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."

In the present case the plaintiffs have failed to satisfy any of the requirements under section 19(1).

In order to obtain leave from the Court to serve their writ out of jurisdiction under Order 11 rule 1, it is necessary for the plaintiffs to show that they have a cause of action. See *Mallal's* Supreme Court Practice, 2nd edn. vol. 1 p.56. In the instant case they have failed to satisfy this requirement. In any event, even if there is cause of action, I do not think this is a proper case for service out of jurisdiction to be granted under O.11 on the facts of this case. See *Amin Rasheed Shipping Corporation* v. *Kuwait Insurance Co.*[3]

In the circumstances, I allow the application and set aside the order of the Senior Assistance Registrar dated January 11, 1984. The costs of, and incidental to this application shall be paid by the plaintiffs to the defendants.

Application allowed.

Solicitors : *Lovelace & Hastings; Skrine & Co.*

UNITED MANUFACTURERS SDN. BHD. v. POGON TOKOU SDN. BHD. & ANOR.

[O.C.J. (Abu Mansor J.) March 7, 1985]

[Kota Kinabalu – Civil Suit No. K134 of 1983]

Practice and procedure – Hire purchase agreement – Claim for stated sum – Striking out defence – Triable issues raised – R.H.C. 1980, O.18 r.19.

In this case the plaintiffs applied by summons for an order that the defendant's statement of defence be struck out under O.18 r.19 or alternatively under the inherent jurisdiction of the Court on the usual grounds. The claim is for a specified sum of money relating to a hire purchase agreement entered into on April 1, 1980.

Held: (1) the plaintiffs have failed to prove their allegations and the claim is not clearly unarguable;

(2) the defendants have successfully raised two triable issues, one relating to the actual date of termination of the hire purchase agreement and the other the actual loss suffered by the plaintiffs;

(3) in order to come to a just and proper decision, this matter must go to a full trial. The plaintiffs' application was therefore dismissed with costs.

[*Editorial Note:* The plaintiffs filed an appeal to the Supreme Court on March 27, 1985.]

Cases referred to:

(1) *Wearne Brothers (M) Ltd.* v. *Jackson* [1966] 2 M.L.J. 155, 156.
(2) *United Engineers (Malaysia) Ltd.* v. *Lai Ping Yoon* [1968] 1 M.L.J. 189.
(3) *Khoo Thau Sui* v. *United Engineers (M) Sdn. Bhd.* [1977] 2 M.L.J. 204.
(4) *Voo Min En* v. *Liong Chung Fatt* [1982] 2 M.L.J. 241.
(5) *Cow* v. *Casey* [1949] 1 K.B. 474.
(6) *United Malayan Banking Corporation* v. *Palm & Vegetable Oils (M) Sdn. Bhd. & 2 Ors.* [1983] 1 M.L.J. 206 F.C.
(7) *Syarikat Bunga Raya Timor Jauh Sdn. Bhd.* v. *Tractors Malaysia Bhd.* [1983] 1 M.L.J. 121 F.C.

SUMMONS-IN-CHAMBERS.

D. Puthucheary (*Edward K.C. Tsen* with him) for the plaintiffs.

Richard Malanjum (*Phillip Lee* with him) for the defendants.

Cur. Adv. Vult.

Abu Mansor J. : I dismissed with costs the plaintiff/appellant's Summons-in-Chambers application dated October 18, 1984, for an order that the defendant's Statement of Defence be struck out under O.18 r. 19 or alternatively under the

inherent jurisdiction of the Court on the ground that:

(1) it discloses no reasonable defence; and/or

(2) it is frivolous and vexatious; and/or

(3) it may prejudice, embarrass or delay the fair trial of the action; and/or

(4) it is an abuse of the process of the Court and that the plaintiff/appellant be liberty to enter final judgment against the defendants/respondents for $793,919.00 being the amount claimed in this action together with interest at 8% per annum from December 10, 1982 to date of judgment and costs including cost of present application to be taxed.

I so made that order of dismissal because the plaintiff/appellant, in my judgment, failed to prove any of the allegation a in Prayers (1), (2), (3) and (4) above and the claim is not clearly unarguable further that the defendants/respondents have successfully raised triable issues in their statement of defence.

In paragraphs 3 to 5 of the Statement of Defence the defendants/respondents managed to raise two issues which can only and should be explored by the parties in a proper trial. That being the case it also speaks of the inability of the Court to decide at that juncture without the benefit of such hearing. The first issue which the defendants/respondents successfully raised was whether the termination of the Hire Purchase Agreement entered into on April 1, 1980 (hereinafter called "the termination issue") was in fact on October 3, 1980. In their paragraph 5 the defendants/respondents denied the plaintiff/appellant's allegation in paragraph 5 of his Statement of Claim that the Hire Purchase Agreement was terminated *vide* their solicitor's letter of January 7, 1983. The defendants/respondents then averred in the said Paragraph 5 that in fact by a telex dated October 3, 1980 ("UM-26") it was the 1st defendant/respondent who expressly terminated the Hire Purchase Agreement. The reason they terminated the agreement was the plaintiff/appellant's inability to provide the much needed spare parts for repair. This can be clearly seen from documents "SJ-5" to "SJ-11" exhibited in defendants/respondents' affidavit sworn on November 21, 1984. That telex ("UM-26") received a response from the plaintiff/appellant which was telex ("UM-27") of October 6, 1980 exhibited in the affidavit of Mohd. Adib bin Hj. Idris sworn on June 16, 1984 which reads:

"Thank yr tlx of Oct 3rd. I regret very much that events has *[sic]* led to this decision. I will instruct my staff in Sabah to commence repossession and to immobilise all machines immediately."

The defendants/respondents in my view validly complained that the plaintiff/appellant had agreed to come and repossess and then did nothing about it and the plaintiff/appellant is claiming for the balance of the purchase price. Without going into the merit of this matter and subject to what a full trial would disclose I am of the view it would appear the defendants/respondents may have a case in saying that the termination is on the October 3, 1980. What effect "UM-26" and "UM-27" would have in law can only be decided at a proper trial as serious questions of law arise.

It is clear to me on this issue solely that if the defendants/respondents can succeed in proving by evidence that the Hire Purchase Agreement was in fact terminated on October 3, 1980 then the defendants/respondents are not liable for the rest of rentals after that material date and it would be clearly wrong for the Court to enter judgment, at that stage, for any sum after that material date. When counsel for the plaintiff/appellant was asked as to the importance of this matter being fully investigated the plaintiff/appellant's counsel agreed that the termination is a big issue as it affects quantum of claim. By this admission I held that plaintiff/appellant agreed that this "termination issue" if it were to be settled it must be settled in a proper trial as the plaintiff/appellant disputes this fact in Paragraph 5(3) of the affidavit of Mohd. Adib bin Hj. Idris for the plaintiff sworn on January 14, 1985. Similarly again the plaintiff/appellant's contention in Paragraphs 11 and 12 of the affidavit of Mohd. Adib bin Hj. Idris sworn on June 16, 1984 to the effect that the alleged termination of October 3, 1980 had been waived by the defendants/respondents can only be proved by oral evidence. Again this can only be done in a proper trial.

The second triable issue which the defendants/respondents managed to raise was what was the actual loss suffered by the plaintiff/appellant? The defendants/respondents say that the plaintiff/appellant must prove that damage. They cite *Wearne Brothers (M) Ltd.* v. *Jackson*[1] the effect of which is that the plaintiff/appellant is not entitled to recover *simpliciter* the sum fixed in the contract but must prove the damage they suffered unless the sum named is a genuine pre-estimate which is disputed by the defendants/respondents. The

defendants/respondents allege that the plaintiff/appellant to claim as in paragraph 6(a)-(e) of the Statement of Claim the full purchase price is not only unreasonable as the machines were second-hand and subject to usual depreciations but also caught by section 75 of the Contracts Act, 1950. If this is disputed then the defendants/respondents' counsel urged the Court to find that it is then a triable issue which can only be thrashed out again in a proper trial which requires both parties to produced evidence of value of the subject vehicles followed by proper submissions on the law. The Court is in agreement with this view.

Then lastly the defendant/respondent submitted that the fact that a Senior Counsel had been engaged to appear in this matter was clear indication that this case involves complex issues of fact and law. The Court is in agreement with this submission for in going through the affidavits of plaintiff/appellant sworn on January 14, 1985 the Court takes notice particularly paragraph 5 of the said affidavit that there are too many "ifs" and the "ifs" relate to triable issues.

I hold that the two cases cited by the plaintiff/appellant, *viz., United Engineers (Malaysia) Ltd.* v. *Lai Ping Yoon*[2] cannot be applied in our present case as the decision was arrived at after a full trial and can be distinguished in that the claim therein related solely to arrears of rental and did not include, as in our present case, damages for breach of hire purchase agreement (see page 192-F of this case), and there being no dispute as to the date of termination of the agreement the claim for arrears, being met by Defence of machines not being in order, was only up to the date of termination. So also is the case of *Khoo Thau Sui* v. *United Engineers (M) Sdn. Bhd.*[3] The Court's decision to make the appellant liable was arrived at after a full trial. The appeal was against the decision after that full trial. As such these cases are distinguishable from decisions from cases of application in Chambers for final judgment under O.18, r. 19, High Court Rules 1980, such as *Voo Min En* v. *Liong Cheng Fatt,*[4] citing *Cow* v. *Casey*[5] which decided that at that stage claimant can only be entitled if and where the Court is satisfied it is really unarguable. The Court was also bound by decisions such as *United Malayan Banking Corporation* v. *Palm & Vegetable Oils (M) Sdn. Bhd. & 2 Ors.*[6] and also similar cases such as *Syarikat Bunga Raya Timor Jauh Sdn. Bhd.* v. *Tractors Malaysia Bhd.*[7] a decision on leasing hire purchase agreement, that where there are triable issues then the only place for it is a proper trial and leave should be given to the defendant to defend.

That being the case the Court came to the conclusion that in order to come to a just and proper decision, this matter must go to a full trial for reasons stated above. I therefore dismissed the plaintiff/appellant's application with costs. In dismissing the plaintiff/appellant's application the Court is far from saying that the appellant will not be entitled to his claim but what we are saying is that the proper place for airing the issues is elsewhere. The plaintiff/appellant may well be successful in his claim at the conclusion of that trial.

The plaintiff/appellant appeals.

Application dismissed.

Solicitors: *Chau & Thien Co.; Richard Malanjum & Co.*

PAVONE v. PUBLIC PROSECUTOR

[O.Cr.J. (Edgar Joseph Jr. J.) May 22, 1985]

[Penang – Criminal Application No. 1 of 1985]

Criminal Law and Procedure – Impeaching credit of witness – Certified copy of record – Procedure to be followed – Evidence Act, 1950, ss. 76, 79(1), 80, 91, 92 & 121 – Criminal Procedure Code (F.M.S. Cap. 6), s. 267.

In this case at the retrial of the accused, a police officer denied that he had said at the earlier trial that his test of the exhibit recovered from the person of the accused was 'opium'. He maintained that it was an opiate and that he had said the same thing at the trial. Counsel for the accused then informed the Court that he intended calling the President who presided at the original trial for the purpose of impeaching the credit of the witness. The request was refused and counsel then applied to the High Court for the necessary order.

Held: (1) a certified true copy of the record of the original trial could be admitted under section 76 of the Evidence Act and such record should remain uncontradicted;

(2) the Court will have to decide whether the difference between the evidence recorded earlier and the evidence given at the retrial is material. If so leave to cross-examine should be given and the procedure for impeachment of the witness followed;

(3) it is clear that the only explanation given by the officer in this case is a denial that he used the word 'opium'